TS Sambanthamurthi v AJ Dason & Ors and another suit

HIGH COURT (KUALA LUMPUR) — CIVIL SUITS NO F370–84 & F258–85
MOHD HISHAMUDIN J
13 NOVEMBER 2007

Contract — Damages — Assessment — Breach of revocation agreement — Whether assessment based on refund of deposit, increment in value of land and interest were correct

In April 1981 the plaintiff entered into a sale and purchase agreement with the fifth defendant concerning the sale of a large piece of land in Kulim, Kedah; the plaintiff being the owner/vendor of the land, and the fifth defendant being the purchaser. The purchase price of the land as agreed was RM2,800,000. The fifth defendant, as purchaser, paid the plaintiff a deposit of RM265,000. Under the terms of the agreement, the balance of the purchase price was payable once the plaintiff had obtained from the relevant authorities the approvals for the land conversion, for the land subdivision, and for the layout plan. It was a term of the contract that these approvals must be obtained by the plaintiff within five months of the signing of the agreement. However, the plaintiff breached the agreement: they were unable to obtain the necessary approvals from the relevant authorities within the stipulated time. The fifth defendant then asked for the return of the deposit, but the plaintiff was unable to refund the same. In order to resolve the impasse, the plaintiff and the fifth defendant arrived at a compromise: on 5 February 1983 both parties entered into another written agreement, which the parties called the 'revocation agreement'. The terms of the revocation agreement were as follows. First, the earlier sale and purchase agreement between the plaintiff and the fifth defendant in respect of the Kulim land was revoked. Second, as a consideration for the revocation of the sale and purchase agreement, the plaintiff was to pay the fifth defendant a sum of RM100,000, upon the signing of the agreement. Third, the land was to be sold should there be a willing purchaser who was prepared to purchase the land. Fourth, upon the land being sold, the plaintiff was to pay the fifth defendant the following sums:

(1) a sum of RM400,000, being agreed as the loss suffered by the fifth defendant by reason of the breach of the sale and purchase agreement by the plaintiff;

(2) a further sum of RM265,000, this amount being the deposit that was earlier paid by the fifth defendant to the plaintiff under the earlier sale and purchase agreement; and

(3) interest of 1% per annum on the sum of RM665,000 from 1 April 1983 until the date of payment.

However, the plaintiff breached the revocation agreement: there was a company by the name of Koperasi Belia Majujaya (M) Bhd that was willing to buy the land for RM3,300,000 but the plaintiff refused to sell the land to this company. The fifth defendant sued the plaintiff (by way of a counterclaim) for this breach of the revocation agreement. The fifth defendant succeeded in their claim before Rahmah Hussain J at the High Court. The High Court at the trial, and upheld on appeal by the Court of Appeal (see *TS Sambanthamurti v Anthony J Dason & Ors and another appeal* [2000] 2 MLJ 104) held that the plaintiff had breached the revocation agreement. At the conclusion of the hearing of the assessment of damages, the registrar made the following award against the plaintiff in favour of the fifth defendant:

(1) As damages for breach of contract, the plaintiff:

(a) shall pay to the fifth defendant a sum of RM265,000, being refund of a deposit paid to and received by the plaintiff; and

(b) shall pay to the fifth defendant a further sum of RM400,000, being the increment in value of the subject property.

(2) In accordance with s 11 of the Civil Law Act 1956, interest is awarded at 6% per annum on the total sum (RM400,000 + RM265,000 = RM665,000) of the above damages assessed from the date of assessment until the date of realization; and

(3) Costs of the assessment.

The plaintiff appealed to the judge in chambers against the whole decision of the registrar. The fifth defendant, on their part, dissatisfied against that part of the decision of the registrar pertaining to interest had appealed to the judge in chambers in relation to this aspect of the decision. The learned counsel for the plaintiff argued that the registrar had erred in assessing the damages based on the revocation agreement. He contended that the assessment could not be based on the revocation agreement because, according to learned counsel, the Court of Appeal had made a finding that the revocation agreement was invalid and unenforceable.

Held, dismissing the plaintiff's appeal and allowing the fifth defendant's appeal:

(1) Judging from the tenor of the judgment as a whole, what the Court of

Appeal meant to refer to was the sale and purchase agreement and not the revocation agreement that was invalid and unenforceable. Moreover, Rahmah Hussain J had made a finding that there was a breach of the revocation agreement and that finding was upheld by the Court of Appeal (see paras 18–19).

(2) As to the award of the sum of RM265,000, clearly the registrar was correct in law in awarding this sum to the fifth defendant. This sum was the deposit that had been paid by fifth defendant to the plaintiff under the sale and purchase agreement, which under the revocation agreement was to be refunded to the fifth defendant (see para 23).

(3) As to the award of the next sum of RM400,000, this sum was also correctly awarded to the fifth defendant by the registrar; for this sum was also stipulated in revocation agreement as being the sum that the fifth defendant would be entitled to receive from the plaintiff had the land be sold to Koperasi Belia Majujaya at RM3,300,000. The fifth defendant's case was fortified by the evidence of DW2 who said that the market price of the land at the time that Koperasi Belia Majujaya offered to buy it was RM3.3m (see para 24).

[Bahasa Malaysia summary

Pada bulan April 1981 plaintif telah memasuki satu perjanjian jualbeli dengan defendan kelima berkaitan jualan sebidang tanah yang luas di Kulim, Kedah; plaintif yang merupakan pemilik/penjual tanah tersebut, dan defendan kelima yang merupakan pembeli. Harga belian tanah tersebut seperti yang dipersetujui adalah RM2,800,000. Defendan kelima, sebagai pembeli, telah membayar plaintif deposit sejumlah RM265,000. Di bawah terma-terma perjanjian, baki harga belian perlu dibayar selepas plaintif mendapat kelulusan daripada pihak berkuasa berkaitan untuk penukaran tanah tersebut, untuk pembahagian tanah tersebut dan pelan susun atur. Ia merupakan terma kontrak bahawa kelulusan tersebut hendaklah diperoleh oleh plaintif dalam tempoh lima bulan daripada menandatangani perjanjian tersebut. Namun, plaintif telah melanggar perjanjian itu: mereka tidak dapat memperoleh kelulusan yang sepatutnya daripada pihak berkuasa dalam tempoh yang ditetapkan. Defendan kelima telah meminta deposit dipulangkan, tetapi plaintif tidak dapat memulangkan wang tersebut. Untuk menyelesaikan jalan buntu tersebut, plaintif dan defendan kelima telah berkompromi: pada 5 Februari 1983 kedua-dua pihak telah memasuki satu lagi perjanjian bertulis, yang mana pihak-pihak namakan ' perjanjian pembatalan'. Terma perjanjian pembatalan tersebut adalah seperti berikut. Pertama, perjanjian jualbeli terdahulu antara plaintif dan defendan kelima berkaitan tanah Kulim tersebut adalah dibatalkan. Kedua, sebagai balasan untuk pembatalan perjanjian jualbeli tersebut, plaintif hendaklah membayar

defendan kelima sejumlah RM100,000, selepas menandatangani perjanjian itu. Ketiga, tanah tersebut hendaklah dijual sekiranya ada pembeli yang ingin dan bersedia membeli tanah tersebut. Keempat, selepas tanah tersebut dijual plaintif hendaklah membayar defendan kelima jumlah berikut:

(1) sejumlah RM400,000, yang dipersetujui sebagai kerugian yang dialami oleh defendan kelima oleh sebab pelanggaran perjanjian jualbeli oleh plaintif;

(2) seterusnya sejumlah RM265,000, jumlah ini merupakan deposit yang telah dibayar terlebih dahulu oleh defendan kelima kepada plaintif di bawah perjanjian jualbeli terdahulu; dan

(3) faedah 1% setahun ke atas jumlah RM665,000 dari 1 April 1983 sehingga tarikh pembayaran.

Bagaimanapun, plaintif telah melanggar perjanjian pembatalan itu: terdapat syarikat dikenali sebagai Koperasi Belia Majujaya (M) Bhd yang ingin membeli tanah tersebut untuk RM3,300,000 tetapi plaintif enggan menjual tanah tersebut kepada syarikat ini. Defendan kelima telah menyaman plaintif (melalui tuntutan balas) kerana pelanggaran perjanjian pembatalan ini. Defendan kelima telah berjaya dalam tuntutan mereka di hadapan Rahmah Hussain H di Mahkamah Tinggi. Mahkamah Tinggi semasa perbicaraan, dan dikekalkan semasa rayuan oleh Mahkamah Rayuan (lihat *TS Sambanthamurti v Anthony J Dason & Ors and another appeal* [2000] 2 MLJ 104) yang memutuskan bahawa plaintif telah melanggar perjanjian pembatalan tersebut. Di penutup perbicaraan penaksiran ganti rugi, pendaftar telah membuat award berikut terhadap plaintif yang menyebelahi defendan kelima:

(1) Untuk ganti rugi kerana pelanggaran kontrak, plaintif:

(a) hendaklah membayar defendan kelima sejumlah RM265,000, yang merupakan pulangan deposit yang telah dibayar oleh plaintif; dan

(b) hendaklah membayar kepada defendan kelima seterusnya jumlah RM400,000, iaitu kenaikan nilai hartanah tersebut.

(2) Menurut s 11 Akta Undang-Undang Sivil 1956, faedah diawardkan pada kadar 6% setahun ke atas jumlah keseluruhan (RM400,000 + RM265,000 = RM665,000) untuk ganti rugi yang ditaksirkan dari tarikh penaksiran sehingga tarikh penyelesaian; dan

(3) Kos penaksiran.

Plaintif telah merayu kepada hakim dalam kamar terhadap keseluruhan keputusan pendaftar tersebut. Defendan kelima, di pihak mereka, berasa tidak puas hati terhadap bahagian keputusan pendaftar berkaitan faedah telah merayu kepada hakim dalam kamar berhubung aspek keputusan ini. Peguam bijaksana bagi pihak plaintif berhujah bahawa pendaftar terkhilaf

dalam menaksirkan ganti rugi itu berdasarkan perjanjian pembatalan. Beliau menegaskan bahawa penaksiran itu tidak boleh berdasarkan perjanjian pembatalan itu kerana, menurut peguam yang bijaksana, Mahkamah Rayuan telah membuat penemuan bahawa perjanjian pembatalan itu adalah tidak sah dan tidak boleh dikuatkuasakan.

Diputuskan, menolak rayuan plaintif dan membenarkan rayuan defendan kelima:

(1) Berdasarkan perjalanan penghakiman secara keseluruhan, apa yang Mahkamah Rayun maksudkan untuk rujuk adalah perjanjian jualbeli dan bukan perjanjian pembatalan yang tidak sah dan tidak boleh dikuatkuasakan itu. Tambahan pula, Rahmah Hussain H telah membuat penemuan bahawa terdapat pelanggaran perjanjian pembatalan dan penemuan tersebut dikekalkan oleh Mahkamah Rayuan (lihat perenggan 18–19).

(2) Berhubung award berjumlah RM265,000, jelas pendaftar betul dari segi undang-undang dalam mengawardkan jumlah ini kepada defendan kelima. Jumlah ini merupakan deposit yang telah dibayar oleh defendan kelima kepada plaintif di bawah perjanjian jualbeli, yang mana di bawah perjanjian pembatalan perlu dipulangkan kepada defendan kelima (lihat perenggan 23).

(3) Berhubung award untuk jumlah seterusnya RM400,000, jumlah ini juga telah diawardkan dengan betul kepada defendan kelima oleh pendaftar, kerana jumlah ini juga telah ditetapkan dalam perjanjian pembatalan sebagai jumlah yang mana defendan kelima berhak menerima daripada plaintif sekiranya tanah tersebut dijual kepada Koperasi Belia Majujaya pada harga RM3,300,000. Kes defendan kelima diperkukuhkan dengan keterangan DW2 yang mengatakan bahawa harga pasaran tanah tersebut pada masa Koperasi Belia Majujaya membuat tawaran untuk membelinya adalah RM3.3j (lihat perenggan 24).]

Notes

For cases on assessment of damages, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 3240–3245.

Cases referred to

TS Sambanthamurti v Anthony J Dason & Ors and another appeal [2000] 2 MLJ 104 (refd)

Legislation referred to

Civil Law Act 1956 s 11

LH Chua (LH Chua) for the plaintiff.
Alvin Tang (Shook Lin & Bok) for the fifth defendant.

Mohd Hishamudin J:

[1] This is an appeal by the plaintiff against the assessment of damages by the learned senior assistant registrar ('the registrar'). At the conclusion of the hearing of the assessment of damages, the registrar made the following award against the plaintiff in favour of the fifth defendant:

(i) As damages for breach of contract, the plaintiff:

(a) shall pay to the fifth defendant a sum of RM265,000, being refund of a deposit paid to and received by the plaintiff; and

(b) shall pay to the fifth defendant a further sum of RM400,000, being the increment in value of the subject property.

(ii) In accordance with s 11 of the Civil Law Act 1956, interest is awarded at 6% per annum on the total sum (RM400,000 + RM265,000 = RM665,000) of the above damages assessed from the date of assessment until the date of realization; and

(iii) Costs of the assessment.

[2] The plaintiff is dissatisfied with the whole of the decision of the registrar on the assessment and has appealed to the judge in chambers against the whole decision.

[3] The fifth defendant, on their part, is dissatisfied against that part of the decision of the registrar pertaining to interest and has appealed to the judge in chambers in relation to this aspect of the decision.

[4] Before me, both appeals are heard together.

[5] I have dismissed the plaintiff's appeal with costs.

[6] But I have allowed the fifth defendant's appeal with costs.

[7] I have read the grounds of judgment of the registrar. I agree with his grounds of decision, except with regards to the rate of interest awarded to the fifth defendant. The grounds of judgment of the registrar can be found at encl 68.

[8] It was the finding of the High Court (before Rahmah Hussain J (as she then was)) at the trial, and upheld on appeal by the Court of Appeal (see *TS Sambanthamurti v Anthony J Dason & Ors and another appeal* [2000] 2 MLJ 104), that the plaintiff had breached a contract entered into between the plaintiff and the fifth defendant known as the 'revocation agreement'. The damages awarded by the registrar are in respect of losses suffered by the fifth defendant as a result of the breach of the revocation agreement by the plaintiff.

[9] In order to fully appreciate why the registrar made the aforesaid award, we have to understand the background. Way back in April 1981 the plaintiff entered into a sale and purchase agreement with the fifth defendant concerning the sale of a large piece of land in Kulim, Kedah; the plaintiff being the owner/vendor of the land, and the fifth defendant being the purchaser. The purchase price of the land as agreed was RM2,800,000. The fifth defendant, as purchaser, paid the plaintiff a deposit of RM265,000. Under the terms of the agreement, the balance of the purchase price was payable once the plaintiff/vendor had obtained from the relevant authorities the approvals for the land conversion, for the land subdivision, and for the layout plan. It is a term of the contract that these approvals must be obtained by the plaintiff within five months of the signing of the agreement, that is to say, on or before 28 September 1981. Time was the essence of the agreement. However, the plaintiff breached the agreement: they were unable to obtain the necessary approvals from the relevant authorities within the stipulated time. The fifth defendant then asked for the return of the deposit, but the plaintiff was unable to refund the same.

[10] In order to resolve the impasse, the plaintiff/vendor and the fifth defendant/purchaser arrived at a compromise: on fifth February 1983 both parties entered into another written agreement, which the parties called the 'revocation agreement'. The terms of this revocation agreement are as follows. First, the earlier sale and purchase agreement between the plaintiff and the fifth defendant in respect of the Kulim land is revoked. Second, as a consideration for the revocation of the sale and purchase agreement, the plaintiff is to pay the fifth defendant a sum of RM100,000, upon the signing of the agreement. Third, the land was to be sold should there be a willing purchaser who is prepared to purchase the land. Fourth, upon the land being sold, the plaintiff is to pay the fifth defendant the following sums:

(a) a sum of RM400,000, being agreed as the loss suffered by the fifth defendant by reason of the breach of the sale and purchase agreement by the plaintiff; and

(b) a further sum of RM265,000, this amount being the deposit that was earlier paid by the fifth defendant to the plaintiff under the earlier sale and purchase agreement;

(c) interest of 1% per annum on the sum of RM665,000 from 1 April 1983 until the date of payment.

[11] However, the plaintiff breached the revocation agreement: there was a company by the name of Koperasi Belia Majujaya (M) Bhd that was willing to buy the land for RM3,300,000 but the plaintiff refused to sell the land to this company.

[12] The fifth defendant sued the plaintiff (by way of a counterclaim) for this breach of the revocation agreement. The fifth defendant succeeded in their claim before Rahmah Hussain at the High Court. The High Court judge (Rahmah Hussain J) held that there was a breach of the revocation agreement by the plaintiff by reason of the refusal on the part of the plaintiff to sell the land to Koperasi Belia Majujaya; and ordered an assessment of damages. On appeal by the plaintiff to the Court of Appeal, this decision of the High Court was upheld by the Court of Appeal. Hence, there is this assessment of damages by the registrar.

[13] At the hearing of the assessment of damages, the fifth defendant did not adduce any evidence but relied purely on the evidence that had already been tendered by the defence witnesses before the High Court judge during the trial of the case. Reference was made, in particular, to the evidence of the following witnesses:

(1) Mr Vasantha Kumar Tharmalingam, a professional property valuer (DW2);

(2) the evidence of Mr Vijaya Kumar, an advocate and solicitor with the legal firm Messrs Sri Ram & Co (DW3); and

(3) the evidence of Mr Raja Durai, a businessman (DW5).

[14] The plaintiff at the hearing of assessment of damages did not call any witness. The learned trial Judge found as a fact, based on the evidence of Mr Vijaya Kumar, that the Koperasi Belia Majujaya was willing to purchase the said land at RM3,300,000. Mr Vijaya Kumar testified that he was authorized by the Chairman of Koperasi Belia Majujaya to make an offer to purchase on behalf of Koperasi Belia Majujaya. This finding of fact by the trial Judge was upheld by the Court of Appeal.

[15] Then there is also the evidence of DW2 who testified that he had valued the land and found it to fetch a market price of RM3.3m.

[16] The learned counsel for the plaintiff argued before me that the registrar had erred in assessing the damages based on the revocation

agreement. He contended that the assessment cannot be based on the revocation agreement because, according to learned counsel, the Court of Appeal had made a finding that the revocation agreement was invalid and unenforceable. The learned counsel for the plaintiff relies on the following words in the judgment of the Court of Appeal (in *TS Sambanthamurti v Anthony J Dason*) which reads (at p 110):

> It is clear to this court that as the *revocation agreement* is no longer valid and enforceable … (Emphasis added.)

[17] In my judgment, there must have been a mistake here in the above words quoted by the learned counsel, in particular, the words 'revocation agreement'. The above words cannot be read in isolation but must be read in the context of the whole passage from which they are extracted. The whole passage reads (at pp 110–111):

> It is clear to this court that as the *revocation agreement* is no longer valid and enforceable, *the fifth defendant is no longer the current purchaser thereof* and therefore by virtue of that fact the titles of the said land (if unencumbered) should be returned to the appellant. It was clearly established to us that the said title was with the first defendant for safekeeping. Mr Anthony J Dason who attended in person told us the property was originally charged by the appellant to Nesa Cooperative at the time when the sale and purchase agreement was signed. The title was then made available to him when the chargees asked for its return and he eventually took out an interpleader summons and he was then holding the title as a stakeholder. After the revocation agreement was repudiated, the chargee requested for its return. Mr Dason told the court the title was still with him and he was happy to hand it over to court's custody. This court then ordered that first defendant do deposit the title with senior assistant registrar of the court pending the outcome of the appeal by the chargee bank. (Emphasis added.)

[18] In my judgment, judging from the tenor of the judgment as a whole, and in particular the whole of the passage that I have just quoted (with emphasis on the words 'the fifth defendant is no longer the current purchaser thereof'), what the Court of Appeal meant to refer to here is the sale and purchase agreement and not the revocation agreement. In other words, what the Court of Appeal intended to say here was:

> It is clear to this court that as the [sale and purchase] agreement is no longer valid and enforceable, the fifth defendant is no longer the current purchaser thereof and therefore by virtue of that fact the titles of the said land (if unencumbered) should be returned to the appellant…

[19] Moreover, Rahmah Hussain J had made a finding that there was a breach of the revocation agreement and that finding was upheld by the Court

of Appeal. This is what Abu Mansor JCA (as he then was) in delivering the judgment of the Court of Appeal said:

> In the course of argument, Mr Porres Royan for the first and fifth defendants contended that the appellant had breached the revocation agreement by his refusal of the offer to purchase the said land by Koperasi Majujaya at the price of RM3.3m. The learned trial judge in her grounds of judgment at p 14 dealt with this and she said:
>
> > Thus by rejecting the offer the plaintiff has breached the revocation agreement and the fifth defendant is therefore entitled to claim from the plaintiff whatever sum is due under the agreement, namely sum of RM665,000 which is as claimed in para 4(1) and (2) of its counterclaim.
>
> As far as the appeal in respect of the appellant's statement of claim against all the respondents is concerned, we dismissed his appeal with costs. As to the appellant's against the fifth defendant in the counterclaim, we allowed the appeal to the extent of setting para (1)(B)(a) of the trial judge's order of 30 May 1995 as at p 42 of the record of appeal bahagian A. We also set aside para (1)(B)(c) in so far as the fifth defendant is concerned. We hereby confirm the learned trial judge's order in para (1)(B)(b) thereof. As for costs in the appellant's appeal against the fifth defendant, the appellant is awarded 2/3 of costs of the appeal.

[20] It must be noted from the above passage that para (1)(B)(b) of Rahmah Hussain J's order was confirmed by the Court of Appeal. Now, this para (1)(B)(b) of the trial judge's order states:

> (b) the plaintiff herein do pay to the fifth defendant herein damages for breach of agreement to be assessed by the senior assistant registrar.

[21] The word 'agreement' in para (1)(B)(b) above refers to the revocation agreement. Indeed, at the earlier part of the judgment of the Court of Appeal, the court said (at p 108):

> We find the contention of the appellant that the sale and purchase agreement was tainted by fraud lacked merit. We cannot accept that it was so material and relevant to the appellant who owned the fifth defendant for if it was a matter that he was so concerned it was open to him to conduct a search and it would have been duly revealed who the directors were before he signed the sale and purchase agreement. *We agree with the finding and reasoning of the learned trial judge that both the sale and purchase agreement and the revocation agreement were valid.* (Emphasis added.)

[22] With respect, it does not make sense to me for the Court of Appeal, on the one hand, to say that the revocation agreement is valid and to agree with Rahmah Hussain J's finding that there had been a breach of the revocation agreement by the plaintiff, and that there should be an assessment

of damages in respect of the breach; yet at the same time to say, on the other hand, that 'the revocation agreement is no longer valid and enforceable'. The Court of Appeal cannot be said to have indulged in self-contradiction. There must have been a slip of the pen by Abu Mansor JCA when writing the judgment of the Court of Appeal.

[23] As to the award of the sum of RM265,000, clearly the registrar was correct in law in awarding this sum to the fifth defendant. This sum was the deposit that had been paid by fifth defendant to the plaintiff under the sale and purchase agreement, which under the revocation agreement is to be refunded to the fifth defendant.

[24] As to the award of the next sum of RM400,000, this sum was also correctly awarded to the fifth defendant by the registrar; for this sum is also stipulated in revocation agreement as being the sum that the fifth defendant would be entitled to receive from the plaintiff had the land be sold to Koperasi Belia Majujaya at RM3,300,000. The fifth defendant's case is fortified by the evidence of DW2 who said that the market price of the land at the time that Koperasi Belia Majujaya offered to buy it was RM3.3m.

[25] I allowed the fifth defendant's appeal on the award of interest. The interest that should be paid to the fifth defendant by the plaintiff on the sum of RM665,000 is 1 percent per annum with effect from 1 April 1983. I consider this as the correct rate as this rate is stipulated by the revocation agreement.

Plaintiff's appeal dismissed with costs. Fifth defendant's appeal allowed with costs.

Reported by Loo Lai Mee